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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GARY HALBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

Petition For Writ of Certiorari

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Questions Presented

1. Whether the trial court violated petitioner's fifth amendment rights by allowing a court-appointed psychiatrist to testify as to specific statements made by petitioner in the course of a court-ordered examination.

2. Whether the trial court committed reversible error by allowing the court-appointed psychiatrist to testify as to specific statements made by petitioner during a court-ordered examination contrary to the provision of Rule 12.2(c).

3. Whether the trial court violated the holding of this court in *Estelle v. Smith,* 451 U.S. 454 (1981), by allowing the court-appointed psychiatrist to testify as to specific statements made by petitioner in the course of a court-ordered psychiatric examination.

4. Whether the United States Court of Appeals for the Ninth Circuit in the instant case decided an important question of federal law which has not been, but should be, settled by this Court by approving the admission of specific statements made to a court-appointed psychiatrist in the course of a court-appointed examination.

5. Whether the Ninth Circuit's decision to allow the court-appointed psychiatrist to testify as to specific statements made by petitioner is in conflict with the prior decisions of this Court and the United States Court of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits.

6. Whether the trial court had an obligation to conduct an evidentiary hearing on the issue of misconduct by one or more jurors and should have granted a new trial.

7. Whether the admission of extrinsic evidence of specific instances of petitioner's conduct was prejudicial error requiring reversal.

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Opinions Below

The Memorandum Decision of the Ninth Circuit Court of Appeals (Appendix A), filed June 10, 1983, was redesignated an Opinion by order of the court August 5, 1983 (Appendix B). The Opinion is reported in 712 F.2d 388 (9th Cir. 1983). The Judgment of the District Court (Appendix D) is not reported.

Jurisdiction

The Decision of the Ninth Circuit (Appendix A) was entered June 10, 1983. Rehearing and rehearing en banc were denied in an order (Appendix C) filed August 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1976).

Constitutional and Statutory Provisions

The fifth amendment to the Constitition of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Federal Rule of Criminal Procedure 12.2 provides as follows:

> Rule 12.2—*Notice of Defense Based Upon Mental Condition*
>
> (a) *Defense of Insanity.* If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
>
> (b) *Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged.* If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue

of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) *Psychiatric Examination.* In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) *Failure to Comply.* If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Federal Rule of Evidence 608 provides as follows:

Rule 608—*Evidence of Character and Conduct of Witness.*

(a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the

character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Statement of the Case

A. Course of Proceedings

On May 10, 1978, a twenty-one-count indictment was returned charging petitioner and two others with mail fraud.

Petitioner was arraigned and entered pleas of not guilty to all twenty-one counts on May 22, 1978.

The first jury trial of petitioner commenced on August 15, 1978. At the close of the government's case, a Motion to Dismiss Counts 7, 8, 10, 11 and 18 was granted. Petitioner was convicted of the remaining sixteen counts, and on September 26, 1978, was sentenced to concurrent terms of imprisonment of 18 months on each count.

On appeal the Judgment of the United States District Court for the Central District of California was reversed and the matter remanded for retrial.

The case was again tried to a jury, commencing on August 11, 1981. Judgment of conviction was entered on August 20, 1981.

A Motion for new trial was denied on September 22, 1981.

On appeal, the Judgment of the United States District Court for The Central District of California upon retrial was affirmed by the Ninth Circuit Court of Appeals on June 10, 1983.

Petitioner made a petition to the Ninth Circuit Court for a Rehearing En Banc. That court issued its declaration denying the Petition For Rehearing En Banc on August 23, 1983. Petitioner has moved that court for a stay of the mandate.

This petition for a writ of certiorari followed.

B. Relevant Facts Concerning the Underlying Conviction

In July 1982, petitioner and his wife were victims of a brutal robbery which profoundly changed their lives. As petitioner was unloading groceries from the family car, he was accosted by two armed men wearing ski masks. He and his wife were gagged and blindfolded. Petitioner was forced into a canvas sack. While petitioner's children slept upstairs, the robbers ransacked the house, repeatedly threatening petitioner and his wife.

As a result of this brutal attack, over the next two years petitioner became increasingly paranoid and forgetful, and drank more than usual. He therefore sought therapy during the summer of 1974 at the Center for Feeling Therapy, an organization petitioner had seen featured in *Psychology Today*.

Unfortunately, the Center operated a bizarre program of "personality disintegration," involving the total breakdown of petitioner's identity and total dependence on the therapists. Petitioner was in the Center's program for the entire three and one-half (3½) years covering the events charged in the indictment.

During his treatment, petitioner attempted to continue his mail-order business. In August 1976, petitioner and Lawrence Bucklan formed a project to market a bicentennial book. Bucklan was the project's director, designing and ordering the printing, arranging for the mailing of promotional materials, and handling the bank account and office business. Petitioner paid all the expenses of the promotional material.

The next month, petitioner also began to help George Culbertson finance a project to sell bicentennial collector's plates. The proceeds from the books were used to send out promotional materials designed by Culbertson for the plates.

Although petitioner worked to make both projects succeed, he was hampered by an inability to concentrate and make decisions due to his continuing therapy at the Center. He made poor business decisions. Suddenly both projects began to crumble. The initial promotions were insufficient to allow production of the books and plates ordered.

Nevertheless, petitioner attempted to guarantee delivery of all the products ordered by attempting to obtain a large loan; arranging to mortgage his wife's house; reducing living expenses by moving Bucklan, Culbertson, and their families to his home; and promoting a second book. In addition, the data for the first book were compiled and typeset, and proofs were prepared. A printer prepared a "dummy" and quoted a price for publication. Six hundred plates were made and produced.

Unfortunately, both projects collapsed completely with the initial investigations by the postal authorities. Although petitioner had at all times fully intended in good faith to fulfill all promises made to his customers, his "personality disintegration" at the Center prevented him from conducting his business affairs with full concentration and with all his mental faculties.

Juridiction of Lower Courts

The subject matter jurisdiction of the District Court for the Central District of California was based on 18 U.S.C. section 3231 (1976). The jurisdiction of the Ninth Circuit Court of Appeals was based on 28 U.S.C. section 1291 (1976).

Argument

I.

THE ADMISSION OF STATEMENTS MADE BY PETITIONER DURING A COURT-ORDERED PSYCHIATRIC EXAMINATION ON THE ISSUE OF GUILT WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

Federal Rule of Criminal Procedure 12.2(b) requires a defendant who intends to defend by asserting a mental condition inconsistent with the required mental state for the offense charged to notify the government of his intent. This petitioner did this prior to trial. Appendix F.

Rule 12.2(c) allows the trial court, "in an appropriate case," upon motion by the government, to order a defendant to submit to a psychiatric examination. In the instant case, upon the government's motion, the trial court ordered petitioner to be examined by Dr. Saul J. Faerstein.

Rule 12.2(c) further provides that "[n]o statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." Despite this clear prohibition, the trial court allowed Dr. Faerstein to testify to statements made by petitioner during the court-ordered examination. 712 F.2d at 389.

The trial court's action is a clear violation of the fifth amendment, Federal Rule of Criminal Procedure 12.2(c), this Court's holding in *Estelle v. Smith*, 451 U.S. 454 (1981), and the holdings of other federal courts.

A. Fifth Amendment

The fifth amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Colombe v. Connecticut*, 367 U.S. 568, 581-82 (1961).

The admission of petitioner's statements made to Dr. Faerstein violates the fifth amendment guarantee that petitioner cannot be compelled to be a witness against himself. Any effort of the government to have compelled petitioner to testify against his will at the trial clearly would have contravened the fifth amendment. Yet the government's reliance on petitioner's unwarned statements to Dr. Faerstein similarly infringe fifth amendment values.

It is clear that petitioner's statements to Dr. Faerstein were not made voluntarily. Petitioner was ordered by the court, pursuant to Federal Rule of Criminal Procedure 12.2(c), to be examined by a court-appointed psychiatrist. Petitioner was never told that any statement he made to Dr. Faerstein would

or could be used at his trial. In fact, Rule 12.2(c) specifically says that such statements cannot be admitted on the issue of guilt. Nevertheless, the trial court allowed the statements in.

It is a plain violation of the fifth amendment and this Court's decision in *Miranda v. Arizona* to compel petitioner to be examined by a court-appointed psychiatrist without telling petitioner that such statements will be used against him. "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here." *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

For this reason, the Ninth Circuit's approval of the trial court's action in allowing the admission of such unwarned statements should be reversed.

B. Federal Rule of Criminal Procedure 12.2

The second sentence of Federal Rule of Criminal Procedure 12.2(c) prohibits the admission at trial on the issue of guilt of any statement made by the accused. Congress specifically added this sentence to the Rule "to secure the defendant's fifth amendment right against self-incrimination." H.R. Rep. No. 247, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News 674, 682.

Congress felt the need to protect an accused's fifth amendment right was so important that it made the Rule's prohibition absolute. As the House Report explains, the Rule as amended cannot be satisfied by even "a limiting instruction to the jury in a single trial to consider statements made to the psychiatrist only on the issue of sanity" because "[t]he prejudicial effect on the determination of guilt would be inescapable." *Id.* The Rule is even less capable of being satisfied when no such instruction was given, as the trial court failed to do in the instant case. It was thus plain error to violate the provisions of the Rule prohibiting the admission of these statements by allowing Dr. Faerstein to testify to them.

The Ninth Circuit was also plainly in error when it approved the admission of these statements. The court erroneously stated that because Congress intended to permit admission of statements on insanity it also intended to allow admission of

statements relative to mental capacity in general. This misconstrues the Rule and Congress's intent.

Rule 12.2(a) deals with the defense of insanity. Rule 12.2(b) deals with the defense of a mental condition vitiating the mental element of the crime charged. Petitioner did not rely on paragraph (a). His defense was in part based on paragraph (b)—lack of the mental element. Congress never suggested in the Rule's legislative history that statements concerning lack of the mental element of a crime could be used against an accused on the issue of guilt. Congress did say that the accused's statements to the psychiatrist can be used at "a *separate* determination of the *issues of sanity* or for sentencing purposes once guilt has been determined" *(Id.)*, but never once said that such statements can be used on the issue of guilt.

Guilt requires that all the elements of the crime, including the mental element, be proved.

The Ninth Circuit correctly recognized that lack of the mental element at least overlaps the issue of guilt. 712 at 390. But rule 12.2(b) plainly prohibited the admission of Dr. Faerstein's testimony as to petitioner's statements to him on the issue of guilt, including the mental element, and requires the reversal of the Ninth Circuit's opinion.

C. *Estelle v. Smith*

The constitutional mandate for the protective mantle of Rule 12.2(c) was recently emphasized by this Court in *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the judge *sua sponte* ordered the defendant to be examined by a psychiatrist to establish the defendant's competency to stand trial for murder. The judge also later allowed the psychiatrist to testify at the sentencing hearing, despite a Texas statute nearly identical to the second sentence of Rule 12.2(c). 451 U.S. at 463 n.6.

This Court held that the defendant's fifth amendment rights had been violated because he had not been told the statements he made to the psychiatrist could be used against him.

This Court found that the fifth amendment was directly involved because the state had used against Smith the substance of the disclosures he made to the psychiatrist. *Id.* at 464-65. That the statements were made during a psychiatric examination did

not remove them from fifth amendment protection, especially when the state had used the statements Smith made for much broader purposes than ordered by the trial court.

Similarly, in the instant case the government used petitioner's statements to the court-appointed psychiatrist against him at the trial. Appendix E at E-22 to E-26. Petitioner was not told his statements would be used against him at trial despite Rule 12.2(c). That the statements he made were during a psychiatric examination did not remove them from fifth amendment protection. Rule 12.2(c) states clearly that the government should not have been allowed to use the statements on the issue of guilt; this was a broader use than the fifth amendment and Rule 12.2(c) allow. For the same reason, the Ninth Circuit should be reversed in this case.

Furthermore, this Court found in *Estelle* that a court-ordered competency examination was not analogous to a sanity examination. In the case of an insanity defense, the defendant's silence after pleading the defense could deprive the state of its only effective means of controverting this new issue interjected into the case by the defendant. 451 U.S. at 465. The defendant's competency is not a new issue interjected by the defendant.

Similarly, the instant case does not involve a new issue interjected by the petitioner. The instant case involves the government's use of petitioner's own statements to establish the elements of the crime charged in the indictment. Petitioner merely defended, claiming a lack of one of the elements of the crime, and put the government to its burden of proving its own case "by the independent labor of its officers, not by the simple, cruel expedient of forcing it from [petitioner's] own lips." *Colombe v. Connecticut*, 367 U.S. 568, 581-82 (1961).

When faced with an in-custody court-ordered psychiatric inquiry, petitioner's statements to Dr. Faerstein were not given freely and voluntarily without any compelling influences. As such, they could be used against petitioner only if he had knowingly decided to waive his rights under the fifth amendment and Rule 12.2(c). These safeguards were not afforded petitioner, and his conviction cannot stand. 451 U.S. at 469.

Finally, if *Estelle v. Smith* is not controlling and does not demand immediate reversal of the Ninth Circuit's affirmance, then the instant case presents a question which has not been, but should be, decided by this Court. The federal constitutional questions presented by this case are significant as set forth herein, and it is respectfully submitted that they should be addressed by this Court.

D. Other Federal Courts

The Ninth Circuit's holding in the instant case is directly contrary to the holdings of other federal courts which have considered the issues presented, and to its own holdings.

In *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980), statements made to the court-appointed psychiatrist by the defendant during a court-ordered examination pursuant to Rule 12.2(c) were used to impeach the defendant at trial. The Fifth Circuit, noting the "clear congressional intent that such statements not be used in a proceeding on the issue of guilt, but rather that they be used solely on the issue of sanity," reversed the conviction. 609 F.2d at 1165, 1167.

In the instant case, the issue of insanity was never raised. Petitioner only raised the issue of lack of the mental element of the offense charged, which clearly bears on the issue of guilt. In *Leonard*, the Fifth Circuit pointed out that sanity at the time of the offense "bears heavily on the issue of guilt, it implicates Fifth Amendment concerns." *Id.* at 1165. How much more, then, does lack of one of the elements of the crime implicate fifth amendment concerns! The Fifth Circuit, on the issue of sanity, noted that

> there is a sharp distinction between use of the defendant's statements made during a court-ordered psychiatric examination on the issue of sanity and the use, before the "fact finders" (here a jury), of incriminating statements made during such psychiatric examination on the issue of guilt and before guilt had been determined. . . .
>
> Therefore, central to the court's authority to order a defendant to submit to a psychiatric examination is what we believe to be a clear

> understanding that the function of statements obtained during the examination is limited to the sanity issue.

609 F.2d at 1165 (citations and footnote omitted).

This is fundamentally at odds with the Ninth Circuit's holding that petitioner's statements could be used against him before the fact finders before guilt had been determined. 712 F.2d at 390.

In *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975), the Third Circuit, similar to the Fifth Circuit, held that the admission of a doctor's testimony concerning statements made by the defendant in the course of a psychiatric examination to determine competency required reversal. The Third Circuit noted that, while under section 4244 a defendant can be compelled to submit to an examination to determine his competency to stand trial, it is not permissible once he is found to be competent to have the psychiatrist testify against him at trial. 519 F.2d at 1044.

Furthermore, the Third Circuit noted that the erroneous admission of the psychiatrist's testimony was not harmless error. "The admission of Dr. Flicher's testimony was error and requires a new trial." This is also fundamentally contrary to the Ninth Circuit's statement that the erroneous admission of Dr. Faerstein's testimony was not plain error. 712 F.2d at 290.

In *United States v. Malcolm*, 475 F.2d 420 (9th Cir. 1973), the defendant asserted a considerable defense on the elements of the offense, including a vigorous argument that the government had not proved the required element of intent. The Ninth Circuit noted that "one of the components of guilt" is the "particular state of mind which is an essential element of the offense charged." *Id.* at 427. Therefore, the Ninth Circuit concluded that when a psychiatrist testifies for the government on the sanity issue at trial on the merits, he is testifying "against the accused on the issue of guilt in any criminal proceedings"; accordingly, he cannot testify on direct examination to statements that the accused made to him during the course of his psychiatric examination. *Id.* Thus the Ninth Circuit's opinion in the instant case is contrary to its own decision in *Malcolm*.

Similarly, contrary to the Ninth Circuit's holding in the instant case are *United States v. Cassidy*, 571 F.2d 534 (10th Cir. 1978) (no error *only* because expert did not testify to defendant's statements); *United States v. Hurst*, 478 F.2d 357 (9th Cir. 1973) (admission of such statements is error, harmless only if defendant's expert first testifies); *United States v. Whittock*, 663 F.2d 1094 (D.C. Cir. 1980) (had testimony been admitted for tendency to buttress issue of guilt, question of self-incrimination would have been implicated). Because the Ninth Circuit has decided an important federal question contrary to the other federal circuits, this opinion should be reviewed by this Court and reversed to conform with the other circuits.

Plain error was committed by the Ninth Circuit in the instant case. No error is more plain than that error which deprives a defendant of a constitutionally and statutorily protected right. Both the fifth amendment and Rule 12.2(c) prohibit the admission into evidence before the fact finders of any statements made during a court-ordered psychiatric examination. To allow the trial court to use Rule 12.2 to circumvent the fifth amendment by first ordering a psychiatric examination and then allowing the incriminating statements to be admitted on the issue of guilt is plain error and should be reversed.

II.

THE CONSIDERATION OF EXTRINSIC MATERIAL BY ONE OR MORE JURORS DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL.

By fateful coincidence, an article describing the sale of the house which petitioner rented during the events in question appeared in the Los Angeles *Herald Examiner* on the morning of the final day of jury deliberations. *Herald Examiner*, August 20, 1981, at A3, col. 1.

The article described an extravagant auction of the home. The sale was portrayed as attracting an assortment of millionaires, celebrities, and "assorted rich folks willing to put at least $1.6 million on the line." The home was described as the "largest luxury estate ever put up for auction," and the article was accompanied by photographs of the refurbished interior.

A juror clipped the article out of the newspaper and brought it with her to the jury room.

Immediately after the verdict of guilty was announced, defendant's trial counsel encountered four of the jurors. He asked them what the most important reason was for the defense's losing the case. One of the jurors immediately blurted out, "Well, for one thing, that big house on the beach didn't help him any." Appendix G. The juror explained that he felt the lavish home occupied by petitioner indicated petitioner really had not tried to save the business. Another juror then opened her purse and withdrew the newspaper clipping, exclaiming, "Did you see this in the newspaper this morning? That's the defendant's house! I'm keeping this as a little souvenir of the trial."Appendix G.

This incident was called to the attention of the trial judge by means of a motion for new trial, which requested that the judge conduct an evidentiary hearing to ascertain what use had been made of this article during the jury deliberations.

The trial judge refused to conduct such a hearing, and denied the motion.

In *United States v. Bagnario*, 665 F.2d 877, 884 (9th Cir. 1981), the Ninth Circuit noted:

> The introduction of outside influences into the deliberative process of the jury is inimical to our system of justice. The jury should reach its decisions only upon the evidence produced at trial, unaffected by extrinsic facts. The Sixth Amendment demands that evidence material to the guilt or innocence of an accused be subject to judicial control and the rules of evidence.

The court further noted that the jury's consideration of extraneous information deprives defendants of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction. *Id.* at n.3.

The court set out in the course of its opinion four principles relative to the introduction of outside influences into the jury room:

(A) The trial court must conduct an evidentiary hearing into the circumstances of an allegation of juror consideration of

extrinsic material to determine the nature of the materials. *Id.* at 885.

(B) The extrinsic materials must relate to the merits of the case. *Id.* at 885, 887, 888.

(C) The trial court should be vigilant in cautioning jurors against consideration of extrinsic material. *Id.* at 889.

(D) The ordinary standard of harmless error cannot be applied. Reversal is required and the defendant entitled to a new trial if there is a *possibility* that the extrinsic material *could have* affected the verdict. *Id.* at 885, 887 n.6.

A careful consideration of these four principles clearly shows that petitioner's conviction should have been reversed.

A. The trial court refused to conduct an evidentiary hearing.

In arguing the Motion for New Trial, counsel repeatedly urged the trial court to conduct a hearing to ascertain from the jurors what use was made of the newspaper clipping during their deliberations. The trial court refused to conduct such a hearing. Nevertheless, the Ninth Circuit concluded in *Bagnario* at 885:

> The trial court, on learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. . . . [R]eviewing courts have looked more harshly upon a conviction when the trial court fails to conduct evidentiary hearings.

It is submitted that the possibility of prejudice was caused by outside material significant enough to require reversal.

B. The extrinsic materials relate closely to the merits of the case.

During the prosecution's case, a conscious attempt was made to portray petitioner as living in the lap of luxury, using the money from the business to support an extravagant lifestyle. The centerpiece of this portrayal was the "beach-house" where the petitioner lived. Testimony was elicited from Culbertson that the house was "on Santa Monica Beach" and rented for $1700 to $1800 per month. Appendix E at E-2. A photograph of the house was dramatically admitted in evidence not once, but twice.

Appendix E at E-2, E-8. Checks used to pay the rent were admitted in evidence and repeatedly referred to. Appendix E at E-5 and E-6, E-7. This evidence was used by the prosecution in its closing argument to rebut petitioner's claim of good faith.

The defense attempted to counter this evidence by emphasizing the spartan nature of defendant's lifestyle. Testimony was elicited that three families were living in the house at the same time, and the house was furnished with "Salvation Army rejects." Appendix E at E-3, E-4. Bucklan testified that they all decided to live under one roof because "it would be cheaper." Appendix E at E-9.

In the context of this factual dispute, it can hardly be suggested that the newspaper clipping brought into the jury room did not relate to the merits of the case. It described the house in glowing terms far beyond anything elicited during the trial, and the defense never had an opportunity to point out to the jury that all these were changes in the house made after petitioner vacated it four years earlier.

This situation is analogous to *Farese v. United States*, 428 F.2d 178 (5th Cir. 1970), where the jury found $750 in the pocket of the defendant's shirt, which was in evidence. Finding a "strong probability of prejudice to the defendant then on trial upon a charge involving unlawful monetary gain," the Fifth Circuit Court reversed.

C. Only perfunctory instructions were given.

In upholding the verdict in *Bagnariol*, the Ninth Circuit noted in 665 F.2d at 889 the importance of cautionary instructions in assessing the impact extrinsic material might have upon jurors:

> Moreover, the judge clearly and carefully delivered instructions to the jury to consider only evidence produced at trial in reaching a verdict. These were given daily during the long trial and again upon summation. This fact alone might justify affirmance. . . . It is all the more compelling when in combination with the immaterial nature of the information, its illogical connection to any relevant or prejudicial jury conclusions, and the trial court's thorough investigation of the incident.

In the instant case, by contrast, the standard admonition to the jurors not to discuss the case included no warning about extrinsic materials. Appendix E at E-1. The single reference to extrinsic material was so abbreviated it could be construed as not applying to extrinsic material brought into the jury room.

> "Anything you may have seen or heard outside the courtroom is not evidence."

When considered in combination with the close relationship of the extrinsic material to the issues being litigated, and the trial court's refusal even to question the jurors concerning the incident, the perfunctory nature of this instruction hardly justifies affirmance.

D. There was a high probability that the extrinsic evidence affected the verdict.

It is highly significant that the first thing a juror said, when asked why the defense lost the case, was:

> "Well, for one thing, that big house on the beach didn't help him any." Appendix G.

In articulating the standard of review to be applied in assessing the impact of extrinsic material upon a jury verdict, the Ninth Circuit said in *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979), "[T]he appellant is entitled to a new trial if there existed a reasonable *possibility* that the extrinsic material could have affected the verdict." (Emphasis added.) The constitutional necessity for this standard was explained in *Bagnariol* at 887 n.6:

> Constitutional errors demand a strict standard of review. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 84, 17 L.Ed.2d 705 (1967). The *Vasquez* standard has been held equivalent to the standard announced in *Chapman*. *Gibson v. Clanon*, 633 F.2d 851, 853 (9th Cir. 1980), *cert. denied, 633 F.2d 851, 853 (9th Cir. 1980), cert. denied*, 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981). The trial court applied the correct standard when it found that the extrinsic evidence 'could not have possibly tainted the verdict.'

In the instant case, the trial judge compounded his erroneous refusal to conduct an evidentiary hearing by applying the wrong standard in assessing the effect of the incident. The judge stated that it was his "finding and ruling that there has been insufficient demonstration of any prejudice to the defendant by the reading of one unnamed juror of this newspaper article. . . ." Thus, instead of assessing whether there was any *possibility* of prejudice, the trial judge erroneously imposed on the defendant the burden of demonstrating actual prejudice. Because the standard of proof applied was incorrect, the conviction should be reversed.

If the trial court had applied the correct standard, it should have granted the motion for a new trial. Not only was it *possible* that the verdict had been affected, it was also highly probable that it had been affected. At least two jurors specifically pointed out to defense counsel that the house was the single greatest factor leading to petitioner's conviction. As to these two jurors, we need not speculate as to whether they were affected. We know they were. They said so! Because the trial court refused to conduct an evidentiary hearing, it is not known how many other jurors were similarly affected. Therefore, because of the high probability that the verdict was affected by the extrinsic matter, the conviction cannot stand.

III.

ADMISSION OF EXTRINSIC EVIDENCE OF SPECIFIC INSTANCES OF PETITIONER'S CONDUCT TO ATTACK HIS CREDIBILITY WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

On cross-examination of petitioner, the government produced a copy of a book he wrote and marketed. Over defense counsel's objection that the sale of the book was not included in the charges and thus was irrelevant, the government was allowed to delve into specific instances in which a money-back guarantee was allegedly not honored. Appendix E at E-10 to E-26.

The cross-examination included not only inquiry of petitioner, but also production of certain extrinsic evidence. The government produced two letters, one from a customer request-

ing a refund, and one from the Postal Inspection Service relating to the same customer's complaint, and testimony by petitioner's former employee, Kay Petitte. When petitioner denied any knowledge of the letters and stated that of his knowledge all refunds had been made, the government was allowed, over defense counsel's objection, to call Miss Petitte to testify in rebuttal.

Federal Rule of Evidence 608(b) makes it very clear that specific instances of the conduct of a witness for the purpose of attacking his credibility may be inquired into only on cross-examination and may not be proved by extrinsic evidence, even if the witness denies them. This limitation was totally ignored when the government was allowed to call Miss Petitte as a rebuttal witness and elicit her testimony concerning whether the refunds were made.

The letters and Miss Petitte's testimony concerning the refunds on orders not the subject of the charges brought against petitioner were introduced solely to attack petitioner's credibility. The Ninth Circuit erroneously upheld the admission of the extrinsic evidence because it found it relevant to petitioner's defense. In doing so, the Ninth Circuit violated its own holding as set forth in *United States v. Bosley*, 615 F.2d 1274 (9th Cir. 1980).

In *Bosley*, the defendant was on trial for distributing cocaine. On cross-examination of the defendant, the prosecution elicited a denial that he had ever delivered cocaine to anybody, then specifically asked if he had ever delivered cocaine to one Hezekiah Rhodes. The defendant denied it. In rebuttal, the government was allowed to call Hezekiah Rhodes to testify that the defendant had delivered cocaine to him on one occasion, a transaction which was not included in the charges then being tried. The Ninth Circuit concluded:

> Fed.R.Evid. 608(b) provides that specific instances of conduct of a witness not resulting in a criminal conviction may not be proved by extrinsic evidence solely for the purpose of attacking the credibility of the witness. Applying the express provisions of Rule 608(b) to the facts of this case, the district court erred in admitting Rhodes's

> testimony. Upon Bosley's denial that he had delivered cocaine to Rhodes or anyone else, the Government could attempt on further cross-examination to elicit a response from Bosley contradicting his prior testimony, but it could not properly impeach Bosley through extrinsic evidence of Bosley's delivery of cocaine to Rhodes. 615 F.2d at 1276-77.

Similarly, once petitioner denied knowledge of the letters and stated that the refunds had been made, the government could have attempted further cross-examination, but could not properly impeach petitioner through extrinsic evidence.

The *Bosley* court also found the improper admission of the evidence was not harmless error because the defendant's credibility was "a critical factor in the trial," and there was similarity between the transaction with Rhodes and the transactions charged in the indictment, creating a risk that the jury would consider the impeachment as substantive evidence of "propensity." 615 F.2d at 1278. Both of these considerations have equal applicability to the instant case. The credibility of the petitioner's testimony that, at all times, he in good faith intended to produce and deliver the books and plates which were ordered was crucial to the defense case, and was directly challenged by testimony of Miss Petitte. The similarity of the transactions, both involving the alleged failure to deliver books ordered through the mail, also created a risk that the jury would consider the testimony as evidence of "propensity." Because the district court's error was, therefore, not harmless, the conviction should be reversed.

Conclusion

This case presents important issues of constitutional law. It concerns matters about which there is considerable confusion and inconsistency in the lower courts. Moreover, it is a criminal case involving the rights and liberty of an individual.

For all the reasons expressed herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Charles F. Abbott
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Suite 7-G
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(801) 375-1200

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

United States of America,

Plaintiff-Appellee,

vs.

Gary Halbert,

Defendant-Appellant.

NO. 81-1581
USDC NO. CR 78-485-MML

Memorandum

Argued and Submitted: March 8, 1983

Appeal from the United States District Court
for the Central District of California
Hon. Malcolm M. Lucas, District Judge, Presiding

Before: CHAMBERS, FLETCHER, and NELSON,
Circuit Judges.

Gary Halbert was convicted by a jury of twenty-one counts of mail fraud, 18 U.S.C. § 1341. On appeal, he raises four major issues. We affirm.

I
Juror Misconduct

There is an allegation that a juror improperly considered extrinsic evidence of a newspaper article about Halbert's beach house.

We independently renew the allegations of juror misconduct to determine whether a new trial is justified because there is "a reasonable possibility that the extrinsic material could have affected the verdict." *United States* v. *Bagnariol*, 665 F.2d 877, 887 n.6 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 2040 (1982). In making this determination, we give substantial weight to the

district court's conclusion about the effect of the juror misconduct. *Id.* at 665.

We conclude that the allegations of juror misconduct do not warrant a retrial because at the trial the jurors heard considerable evidence about the beach house and Halbert's life style. We agree with the district court that there is no reasonable possibility that the newspaper article affected the verdict.

Applying an abuse of discretion standard, *United States v. Hendrix*, 549 F.2d 1225, 1129 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977), we find that the district court was correct in refusing to conduct an evidentiary hearing on the matter. Although it is usually preferable to hold such a hearing, in this instance, the court knew the exact scope and nature of the newspaper article and the extraneous information. *Cf. Bagnarial*, 665 F.2d at 885 ("The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information.").

II
Psychiatric Testimony

Dr. Faerstein conducted a court-ordered psychiatric examination of Halbert. Halbert contends that Dr. Faerstein's testimony, which included statements made by Halbert during the course of examination, violated his fifth amendment right against self-incrimination and Federal Rule of Criminal Procedure 12.2(c).

Since Halbert did not object to Dr. Faerstein's testimony at time of trial, we must first determine whether the error is so plain as to justify review. If so, we must determine whether the error requires reversal. Fed. R. Crim. P. 52(b); *United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978).

Halbert's argument focuses upon Federal Rule of Criminal Procedure 12, which provides in part:

> No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused *on the issue of guilt* in any criminal proceeding.

Fed. R. Crim. P. § 12.2(c) (emphasis supplied).

Halbert does not dispute the fact that the legislative history of the rule as well as the pertinent case law makes clear that his statements to Dr. Faerstein can be admitted on the issue of insanity. *See* H. Conf. Rep. No. 414, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News 713, 715; *United States v. Madrid,* 673 F.2d 1114, 1120 (10th Cir.), *cert. denied,* 103 S. Ct. 96 (1982); *United States v. Leonard,* 609 F.2d 1163, 1165-66 (5th Cir. 1982). He argues, however, that because he raised the issue of diminished capacity, not an insanity defense, his statements to Dr. Faerstein were inadmissible because they bear on the issue of guilt (intent) and not on the issue of insanity. Furthermore, because his statements bear on the issue of guilt, admission of those statements violates his fifth amendment right against self-incrimination.

Halbert's argument elevates form over substance. Although diminished capacity technically may not be an insanity defense, *see United States v. Winn,* 577 F.2d 86, 89-90 (9th Cir. 1978), there is no indication that the language in Rule 12.2 regarding statements "on the issue of guilt" was designed to cover statements relating to defendant's mental capacity. Issues relating to defendant's mental capacity necessarily overlap with "the issue of guilt." Because Congress intended to permit the admission of statements related to insanity, there is little doubt that it also intended to admit statements related to mental capacity in general.

In addition, Halbert's argument is contrary to the conceptual underpinnings of Rule 12.2: " '[W]hen the defendant has raised the issue of insanity and the psychiatrist is called to testify on this question, the defendant must not be allowed to muzzle him at his option.' " *Madrid,* 673 F.2d at 1120-21 (quoting *United States v. Julian,* 469 F.2d 371, 376 [10th Cir. 1972]). This logic applies equally well to a situation in which the defendant raises the issue of "diminished capacity."

Admission of Halbert's statements to Dr. Faerstein was not plainly in violation of Rule 12.2. Similarly, it did not represent a clear violation of Halbert's fifth amendment rights. After raising the issue of mental capacity, Halbert cannot complain that Dr. Faerstein used his statements against him.

See Madrid, 673 F.2d at 1121; *United States v. Whitlock*, 663 F.2d 1094, 1107 (D.C. Cir. 1980); *cf. United States v. Malcolm*, 475 F.2d 420, 425 & n.4. (9th Cir. 1973) (noting that courts have regularly concluded that there is no fifth amendment problem in this type of situation, although the reasoning has not always been clear).

Thus, the admission of parts of Dr. Faerstein's testimony was not plain error and is not reviewable.

III
Jury Instruction

The district court below instructed the jury as follows:

> The test for determining the materiality of the false statement, representation or promise is whether it is made to induce action or reliance upon another. In other words, does it have a natural tendency to influence or is it capable of influencing another's decisions? The government is not required, however, to show actual reliance by anyone on these statements.

The district court's definition conforms in large part to our opinion in *United States v. Halbert (Halbert I)*:

> A misrepresentation may be material without inducing any actual reliance. What is important is the intent of the person making the statement that it be in furtherance of some fraudulent purpose.

640 F.2d at 1000, 1009 (9th Cir. 1981). The jury was, therefore, properly instructed.

IV
Rebuttal Testimony

Halbert contends that Kay Petitte's testimony was offered to impeach his credibility on an extrinsic matter and thereby violated Federal Rule of Evidence 608(b). He argues that the error was highly prejudicial because his credibility goes to the crux of the case.

This argument is unpersuasive. The trial court's decision to admit rebuttal evidence is reviewed for an abuse of discretion. *See United States v. Batts*, 573 F.2d 599, 603 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978). Under Rule 608(b) extrinsic evidence of specific instances of conduct is not admissible if offered solely for impeachment. *See United States v. Bosley*, 615 F.2d 1274, 1276 (9th Cir. 1980). The trial court did not abuse its discretion because Petitte's testimony was not offered solely to impeach Halbert. It also was highly relevant to Halbert's defense of diminished capacity.

AFFIRMED.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, *vs.* **Gary Halbert,** Defendant-Appellant.	NO. 81-1581 USDC NO. CR 78-485-MML **Order**

Argued and Submitted — March 8, 1983
Decided — June 10, 1983

Appeal from the United States District Court
for the Central District of California
Hon. Malcolm M. Lucas, District Judge, Presiding

Before: CHAMBERS, FLETCHER, and NELSON,
Circuit Judges.

The memorandum decision filed June 10, 1983, is hereby designated an opinion with Judge Nelson as the author.

APPENDIX C

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, *vs.* **Gary Halbert,** Defendant-Appellant.	NO. 81-1581 D.C. NO. CR 78-485-MML **Order**

Before: CHAMBERS, FLETCHER and NELSON,
Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

United States of America
vs.
DEFENDANT:
Gary Halbert

United States District Court
for Central District of California
Docket No. CR78-485-MML

Judgment and Probation/Commitment Order

In the presence of the attorney for the government, the defendant appeared in person on this date .....September 22, 1981

COUNSEL:

( ) **WITHOUT COUNSEL**
However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

(X) **WITH COUNSEL**
Charles Abbott, retained.

PLEA:

( ) **GUILTY,** and the court being satisfied that there is a factual basis for the plea.

( ) **NOLO CONTENDERE,**

(X) **NOT GUILTY**

FINDING & JUDGMENT:

There being a xxxxx/verdict of

( ) **NOT GUILTY.** Defendant is discharged.

(X) **GUILTY.**

Defendant has been convicted as charged with the offense(s) of mail fraud and causing an act to be done in violation of 18 USC 1341 and 2, as charged in counts 1 through 6, 9, 12 through 17, and 19 through 21 of the Indictment.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months on each of counts 1 through 6, 9, 12 through 17, and 19 through 21, and these sentences shall are to run concurrently. The defendant shall become eligible for parole pursuant to 18 USC 4205(b)(2), at such time as the U.S. Parole Commission may determine.

SPECIAL CONDITIONS OF PROBATION: IT IS ORDERED that execution of sentence is stayed until September 25, 1981, at 9:00 A.M.

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General xxxxxxx.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

FILED: Sept. 24, 1981
Edward M. Kritzman, Clerk

SIGNED BY:
(X) U.S. District Judge
( ) U.S. Magistrate

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
Date: Sept. 24, 1981

APPENDIX E

to ask those questions would be when you begin your deliberations together. And that's one of the purposes of deliberation, of course.

Now, I'll be giving you an admonition from time to time, and it goes, I think, to the keeping of an open mind and being patient in the case. The admonition goes as follows: It is your duty not to converse among yourselves or with anyone else or to form or express an opinion on this case until it is finally submitted to you. For example, when you go home tonight, I would suggest that you tell those at home tonight simply that you've been selected as a member of a jury in a criminal case, but that the judge has asked you not to discuss the nature of the charges or anything else about the case until it is all over with. And naturally, when you have reached your verdict and the case is all over with, you may discuss it with whomever you wish and, of course, as fully as you wish. But I think it better not to, during the course of the trial, discuss it. Again, I think that will help you keep an open mind as we go along.

Now, I'd like to suggest to counsel two stipulations: that the admonition just given is sufficient and that the Court need not repeat it at every recess, although I will be repeating it from time to time, and second, that during all proceedings it shall be stipulated. . . .

MISS CONLON: Would the clerk place before the witness Government Exhibit No. 19 for identification.

(Plaintiff's Exhibit 19 was placed before the witness.)

BY MISS CONLON:

Q Do you recognize that photograph, Mr. Culbertson?

A I beleve that's the house that Mr. Halbert was renting when I was out here.

Q Where was that house located?

A That was located on Santa Monica Beach.

Q Do you recall what the monthly rental payments were?

A I believe I heard either $1,700 or $1,800 a month.

MISS CONLON: Your Honor, we move into evidence Government Exhibit 19.

THE COURT: Any objection?

MR. ABBOTT: No objection.

THE COURT: It will be received.

(Plaintiff's Exhibit 19 was received into evidence.)

BY MISS CONLON:

Q Now, when the National Collectors Guild failed to ship any plates to these 3,500 people who paid for them, did you receive complaints?

A Yes.

Q Isn't it correct basically that the entire letter is designed to be just as attractive and appealing as possible?

A Yes.

Q You've also indicated that some of the proceeds were used for living expenses. How many people were living in this house that you testified about?

A There was Mr. Halbert, myself, my wife and my son, and Larry Bucklan.

Q Was Mr. Freeman living there for a short period of time?

A I believe that's where he stayed when he came out here, but I don't know.

Q How many bedrooms did the home have?

A I don't remember.

Q Was it three?

A Three or four. I don't recall.

Q Basically, when Mr. Freeman was there, you had four different separate family units living in the same home?

A I was not there when Mr. Freeman was there.

Q Why did everyone choose to live together in the same house?

A I suppose because they couldn't afford to live anyplace else.

Q Did there seem to be a general money shortage with everybody that was living there?

A Well, there was with me.

Q Did you see evidence that anybody else was living high on the hog?

A I suppose not.

Q The furniture in the house was basically what you'd describe almost as Salvation Army rejects; is that correct?

A It was—it wasn't too great.

Q And Mr. Halbert was driving an old 1953 pickup truck; isn't that correct?

A Yes.

Q In addition to that, there was some—Mr. Culbertson, I don't want to embarrass you or anything, but are you—

MISS CONLON: Your Honor, I object to these editorial interjections.

THE COURT: Yes. Sustained.

BY MR. ABBOTT:

Q Your wife was living with you in Mr. Halbert's home at that time?

A Yes, she was.

"Culbertson."

MISS CONLON: So stipulated, your Honor.

THE COURT: The Court accepts the stipulation.

BY MISS CONLON:

Q Would you examine, please, Government Exhibit 16-O.

A It is a check paid to the order of Sid Slagerman or Glagerman—I'm not certain which it is—dated April 4, 1977, for $1,800, check drawn on the National Collectors Guild.

Q Are there any notations on the front of that check?

A Is says "For 637 Pacific Coast Highway, S. M." Santa Monica, I would assume. And it bears a stamp of B of A.

Q All right. Would you examine, please, Government Exhibit 16-P.

A 16-P is a check drawn on the National Collectors Guild, pay to the order of Sid Slagerman, the amount of $1,800, dated 16 May 1977.

Q Would you please examine Government Exhibit 17-A and 17-B.

Can you identify those two documents?

A Those would be photocopies of cashier's checks

A Well, there were a number of people. Early on in promotion I made checks out to G.C.H. & Co., which was Mr. Halbert's company in that same building, and those were in repayment of the moneys taken out of that company to pay for the initial mailing. I was instructed to make out—to draw funds from Impressions to pay for Mr. Halbert's rent, I was instructed to make out checks from the Impressions account to pay for Mrs. Halbert's rent, which was a different household, living expenses for Mr. Halbert's home were taken out of that account, I would write checks for his maid, to do the shopping, and for various household expenditures.

Q Did you make checks payable to cash as well?

A Yes; oftentimes.

Q Now, did you ever have a conversation with him concerning the balances that were to be maintained in the Impressions checking account?

A Yes.

Q Approximately when was that?

A September, October of 1976.

Q Where did that conversation take place?

A Probably at Mr. Halbert's house.

Q Did you live at Mr. Halbert's house?

A Not at that point. But I did end up living there, yes.

Q What did he say and what did you say in that conversation?

A Mr. Halbert instructed me to never leave too much money in the checking account, because if an investigation were started, the IRS or the postal inspectors could seize the bank accounts. So what we were to do was write out checks and purchase cashier's checks, and those were then deposited, to my knowledge, in Mr. Halbert's or Mrs. Halbert's safety deposit box in the bank.

Q Did you have access to their safety deposit box?

A No.

Q Do you know who Sid Slagerman is?

A Yes. Mr. Slagerman owned Gary's—the house that Gary rented on the beach.

Q In Santa Monica?

A Yes.

Q And were checks made payable to Sid Slagerman from any of the accounts, the promotions, that you were associated with?

A Yes.

Q What was the monthly rental, if you recall?

A $1,800 a month.

MISS CONLON: Your Honor, there's another exhibit

A He called us.

Q Did he have any role in the management of the National Collectors Guild after he left California?

A No.

MISS CONLON: Would the clerk please place before the witness Government Exhibit 19. It's a photograph.

THE CLERK: Plaintiff's Exhibit 19 in evidence is before the witness.

BY MISS CONLON:

Q Do you recognize the house depicted in that photograph?

A Yes.

Q What is it?

A This is the house that Mr. Halbert lived in and that I subsequently moved into.

Q Was that on Pacific Coast Highway in Santa Monica?

A Yes.

MISS CONLON: Your Honor, the government moves into evidence Exhibit 19.

MR. ABBOTT: No objection.

THE COURT: It will be received.

(Plaintiff's Exhibit 19 was received into evidence.)

A Mr. Halbert's oldest son, Jeff, George Culbertson, his wife, and their child.

Q For how long a period did Mr. and Mrs. Culbertson live at the home on the beach?

A They lived there all the time that they were in California. I'm not quite sure how long that was. Four or five, maybe six months. I really don't remember that.

Q What was the purpose for everyone living there together?

A Well, I had been living in an apartment in Venice, and we just decided—since all the money was coming out of the same pot to keep us going while we worked through this, it was just decided that it would be cheaper if we all lived under one roof.

Q And is it correct taht during this period of time, Mrs. Culbertson tried at one point to commit suicide?

A Yes, I believe that's true.

Q And that she was continually on the verge of suicide; at least so it seemed to you?

A She was always very upset.

MISS CONLON: Objection, your Honor, without a foundation.

THE COURT: Sustained.

THE COURT: Please approach.

Perhaps, if you're going to be offering the next book, I can see if there's an objection to that, and then I can hear, if there is an objection to both, both at side bar.

BY MISS CONLON:

Q Mr. Halbert, would you examine Government Exhibit 23 for identification. Do you recognize that?

A That's the stamp book. The answer's "Yes."

Q What is the title of the book?

A "Thank God Not Everything Printed by the U.S. Government Loses Its Value."

MISS CONLON: Your Honor, we intend to move that into evidence also.

MR. ABBOTT: I've never seen either of these, your Honor, but I do object on the grounds of relevance, since they are not books at issue in this case.

THE COURT: You may approach.

(The following proceedings were had between the Court and counsel at side bar, outside the hearing of the jury:)

THE COURT: All right.

MISS CONLON: Yes, your Honor. He has testified and other witnesses have testified about his other business activities

at this time when he was allegedly brainwashed. He has also testified on direct examination that he always made refunds and he always delivered the products ordered through the G.C.H. Company, and the G.C.H. Company was in the business of distributing these two books. I intend to ask him some follow-up questions. There are also several statements in each of those books that might have a bearing on his state of mind at the time he wrote the books.

THE COURT: Let me ask—I'm not clear—Exhibit 22, which is the commodity book, does bear a copyright date of 1975, as does the stamp book, Exhibit 23. What is the offer of proof, if you have one, as to when these particular publications were actually written, as opposed to being copyrighted?

MISS CONLON: They were written during a period when he claims he was under intensive therapy, the Feeling Therapy Institute. They were marketed during the same period of time as is in issue in this case. In fact, there's already been testimony in the government's case that funds were taken from the promotions involved in this case and put into the stamp book. And his conduct of the G.C.H. Company business is relevant to his state of mind, since all of this occurred in the same time, the marketing

of these books and the operation of these promotions.

THE COURT: Refresh my recollection. When did he begin this activity in the Center for Feeling Therapy, or whatever the name of it is?

MR. ABBOTT: Immediately after he moved to California.

THE COURT: That was when, again?

MISS CONLON: August, 1974.

MR. ABBOTT: Yes.

THE COURT: And when was the writing begun and completed on each of these exhibits, in terms of an offer of proof?

MR. ABBOTT: After that period.

THE COURT: August of 1974? Well, would this not reflect upon his abilty to collect and analyze—I haven't read these, so I don't know, but would these books not reflect upon his ability to concentrate and be analytical and to reflect on things and his capacity and all the rest?

MR. ABBOTT: I think that the—

THE COURT: I gather that's what the government is offering them for, at least in part.

MISS CONLON: Yes, your Honor.

MR. ABBOTT: I think that the—my only concern is that

we expand the issues of the case to the point where we'll be here for the rest of the month if we start trying every project. So the probative value I think is outweighed by the time that it would consume. And I would submit it on that basis, your Honor.

THE COURT: Well, absent some proof that it's going to substantially enlarge the issues, it seems to me that these particular books, if they were made during this time when he claims to have diminished capacity, and, if I understand your offer of proof, they were commenced after this initial three-week period of intensive therapy, at which time he, according to the psychiatrist, is in a state of brainwashed condition, I think they would be reflective and probative. I'll overrule the objection and receive the exhibits.

(Whereupon, proceedings were resumed in open court within the hearing of the jury.)

THE COURT: The objection is overruled and the exhibits are received.

(Plaintiff's Exhibits 22 and 23 were received in evidence.)

BY MISS CONLON:

Q Mr. Halbert, with respect to Government Exhibit 22,

of each of those two exhibits, Government Exhibits 24 and 25, there are different prices indicated for the book, are there not?

A Yes, there are.

Q Government Exhibit 24, the stamp book, is advertised for the price of $20 by G.C.H. and Co.?

A Yes, ma'am.

Q And Government's Exhibit 25, the same book, is advertised at a price of $14.95?

A Yes, ma'am.

Q Was the price of the book reduced at one point?

A I don't know if it was reduced or increased. I cannot recall from looking at these exhibits.

Q Now, you mentioned during direct examination that refunds were made when requested for this product, for this book?

A Yes, ma'am.

Q Was there a letter of guarantee in your letters, in your solicitation letters, concerning this book?

A I believe there was. I'm almost certain.

THE COURT: When you say "this book"—

BY THE WITNESS:

A The stamp book?

Q The stamp book, Government Exhibit 23.

A I'm certain there was, yes. I mean, I can look for it if you want me to, but I'm sure there was.

Q Would you please examine the first paragraph on the last page of Government Exhibit 24.

A I have it.

Q Would you please read that paragraph.

A "You can order the report by mail (it's the best way to use the free stamp) and G.C.H. and Co. will give you a 100 percent ironclad, money-back guarantee that is good for 30 days while you check everything out."

Q Did you write that statement?

A Yes, ma'am.

Q Would you examine the last page of Exhibit 25, a second letter concerning the stamp book.

A Yes, ma'am.

Q And the top paragraph on the last page of the letter, does the same 100 percent ironclad, money-back guarantee appear?

A Yes, ma'am.

Q Now, did people request refunds?

A Occasionally. Not often.

Q And did you make those refunds?

A Yes, ma'am. To the best of my knowledge, we made all of our refunds.

Q Did you ever receive complaints from people who didn't receive their book or receive their refunds?

A I'm sure that in the normal course of this business, we had to have received some. As I explained earlier, Mr. Jenney and Charlotte Mathias ran the office. But in the normal course of business of any business of this type, you receive complaints.

Q When did Mr. Jenney start running G.C.H. Company?

A I don't recall.

Q Were you aware of a man named Clifford Whipple, who complained that he had ordered his book and for three months didn't receive it? Referring now to March 23, 1977.

A I don't—I don't remember Clifford Whipple.

MISS CONLON: Your Honor, may I approach the clerk?

(Brief pause.)

Would the clerk please place Government Exhibit 27 for identification before the witness.

THE CLERK: Plaintiff's Exhibit 27 marked for identification is before the witness.

BY MISS CONLON:

Q Would you examine that letter, please.

A Yes, ma'am.

Q Does that letter refresh your recollection as to whether

or not a man named Clifford Whipple complained that he had been waiting three months for a stamp book that he had ordered and not received?

A It does not. I mean, I'm not saying that the letter was not received. I do not remember it.

Q Was G.C.H. and Co. contacted by a postal inspector concerning Mr. Whipple's complaint?

A I don't know. They may have been.

MISS CONLON: May I approach the clerk, your Honor?

(Brief pause.)

BY MISS CONLON:

Q Would you examine, please, Government Exhibit No. 28, marked for identification, which purports to be a letter dated June 20, 1977, from the Postal Inspection Service to G.C.H. and Co. Does that letter refresh your recollection as to whether a complaint was received from the Postal Inspection Service to G.C.H. concerning Mr. Whipple?

A No, it does not.

Q Mr. Halbert, is it your testimony that George Jenney and Charlotte Jenney handled all the refunds for G.C.H. and Co.?

A They either handled all or most of them.

Q Didn't George Jenney and Charlotte Jenney receive all their instructions from you?

A Well, once I was satisfied they could handle the business, I left it pretty much up to them.

Q Didn't you instruct an employee of G.C.H. not to make any more refunds in early 1976?

A I have no recollection of doing that.

Q Did you hire the secretarial services of a woman named Kay Petitte?

A Yes, I did.

Q And did she do work for G.C.H. and Co. from the summer of 1975 to early 1976?

A Yes, she did.

Q And didn't you order Miss Petitte to stop making refunds to people who wanted their money back on your money-back guarantee for the book?

A As far as I can recall, I ordered Miss Petitte out of my life, because she was screwing up everything so badly. I don't—

MISS CONLON: Your Honor, I move to strike that answer and request that—

THE COURT: Sustained. It will be stricken.

BY MISS CONLON:

Q Did you make that statement to Miss Petitte? Did you

order her to discontinue making refunds to people who had ordered the book?

A I do not recall making that statement to her.

Q In fact, you had Miss Petitte pay your personal expenses out of the G.C.H. Company funds, did you not?

A She may have. I don't—

Q Did you ever request Miss Petitte to write checks on G.C.H. to your maid?

A I may have.

Q And $1,800 for the rent on your beach house?

A I very well may have.

Q Now, are the representations you made in your silver-commodities book truthful, Mr. Halbert?

A To the best of my knowledge.

Q In fact, you filled out an affidavit on the front of that book?

A This is true.

Q Did you disclose in that book that you lost the $70,000 you made in silver commodities because—

A That would have been impossible. It didn't happen till after the publication and the sale of the book was stopped.

Q Why was the sale of the book stopped, sir?

A Well, the sale of the book was stopped initially because

the book stopped selling, and then, of course, I believe it's fair to say the principles in the book are no less valid than when written. In my particular case, I just didn't continue to follow them.

Q Did you have any inquiries from any government agency concerning your silver-commodities book?

A Yes, I did.

Q Which agency was that?

A That was an agency, as I recall, about to be formed that was going to regulate the commodities business, if my recollection is correct.

MISS CONLON: Would the clerk please place before the witness government group Exhibits 1, 2, 3, 4, 5, 6, and 7.

THE CLERK: Plaintiff's Exhibits 1 through 7 received in evidence is before the witness.

BY MISS CONLON:

Q Mr. Halbert, would you examine Government Exhibit 1-A, which is the first document before you, I believe.

A Yes, ma'am.

Q That's a solicitation letter under the letterhead "Impressions of American Historical Society"?

A Yes, ma'am.

know if any were done in gold. I am going to assume they were not.

Q Now, did you have an occasion to redraft the Impressions of America letter?

A I believe so.

Q Will you turn, please, to Government Exhibit 2-C, which bears the heading "A personal note from the desk of Lawrence B. Bucklan."

A I'm trying to find it here.

Oh, here.

A That would be in group Exhibit 2.

A Yes.

Q Did you draft that letter?

A I believe I did. I believe I did.

Q Now, in August of 1976, weren't thousands of solicitation letters just like Government Exhibit 1-A sent through the mail. That was a Shively letter that you just identified.

A I believe they were.

Q In fact, approximately 100,000?

A I think that's correct.

Q And you did receive a lot of money in response to that letter; isn't that true?

A Yes.

business activities which he conducted during the period of time that he was involved in the Center for Feeling Therapy. He discussed with me as well where he was living, who he was in contact with, what kind of activities he was involved in during that period of time. And in addition to his statements about his activities during that period of time, I had the statements of the people he worked with, the people who worked for him, concerning what he was doing, what he was saying, how he was involved in his business activities during that period of time. And all these statements led me to believe, led me to reach a conclusion, that although he was in therapy at that time and although he may have been depressed at that time, there was no evidence of any impairment or the kind of impairment or the degree of impairment which would prevent him from forming a mental intent to defraud or deceive another individual.

Q Did you find any evidence that Mr. Halbert suffered from any mental disease or defect during that period of time?

A Yes. I believe that at that time he was in a state of depression, and I would characterize it probably as an agitated depression, intermittently, although not continuously. He had a chronic alcohol problem, which he said was diminished in its degree from the period that he was at the Center for Feeling Therapy. In fact, he told me that he actually drank very little

during the time that he was at the Center for Feeling Therapy, but he had had an alcoholic problem prior to that. There was no other evidence of any other significant mental disorder during that time.

Q Did you find any evidence that Mr. Halbert was brainwashed during that period of time?

A I didn't find any evidence of that.

Q Did you find any evidence that he had a passive-dependent personality?

A Well, I would not make that diagnosis, although I would understand that there is material that someone else might use to make that diagnosis. I would not have applied that diagnosis to him.

Q Now, did Mr. Halbert indicate to you during the course of your examination whether or not he understood the purpose of your examination?

A I began my examination by explaining to him who I was and what the purpose of my examination was. He understood it, and he expressed that understanding to me.

Q Did Mr. Halbert bring anything with him to the meeting?

A Yes, he did.

Q And what was that?

A He brought several papers, and included amongst the papers he had with him were two articles from the Los Angeles Times about the Center for Feeling Therapy.

Q What, if anything, did Mr. Halbert do with those articles during your examination of him?

A He read extensively from those articles to me in his attempts to explain to me the nature of the center and the nature of the therapy he was describing.

Q What was Mr. Halbert's demeanor during your examination of him?

A He was generally cooperative, he was bright, he was articulate. He was not agitated. He was not depressed. At times he became somewhat agitated in his discussion of the center and somewhat angered at the treatment he had experienced, but he was quite articulate in expressing his opinions about the institute and the treatment.

MISS CONLON: No further questions, your Honor.

THE COURT: Thank you.

You may examine.

REDIRECT EXAMINATION

BY MISS CONLON:

Q Doctor, you indicated that it's your opinion that Mr. Halbert suffered from depression at times?

A Yes.

Q Did that depression affect his capacity to form a specific intent to defraud other people?

A No, it did not.

Q Now, you mentioned that there are individual reactions to therapy, and one of them being the measure of resistance or the degree of resistance. Did you find any evidence that the defendant resisted the influence of the Feeling Therapy Institute?

A Yes. I think that that was a very significant factor with Mr. Halbert. First he lived apart for the major period of that time from the institute. He lived in the beach house rather than living in the compound or in a house nearby the center; that he lived with people who were not patients or members of the Center for Feeling Therapy. He, during that time, did not follow all the directions of his therapists. He said he went to movies,

he went to restaurants, against the advice or direction of the therapists there. And from the evidence that I was able to hear while I was in court, he explained that during the entire time he was at the center, he questioned the therapy. He asked, "Why am I doing this? Why am I benefiting from this? How is this going to help me?" He discussed the therapy with other people. That he was constantly questioning the therapy and questioning his involvement in it. And at no time had he lost his identity, had his identity been broken down, had his resistance to the therapy been broken down. At no time was he, in the lay parlance, brainwashed.

MISS CONLON: No further questions, your Honor.

MR. ABBOTT: No questions, your Honor.

THE COURT: Thank you. You may step down, sir.

MISS CONLON: The government rests, your Honor.

THE COURT: Thank you.

MR. ABBOTT: The defense rests, your Honor.

THE COURT: Very well. We're going to recess at this time, ladies and gentlemen, until tomorrow morning at 9:30. Again you admonished not to discuss this case amongst yourselves or with anyone else or to form or express an opinion thereon until it is finally submitted to you. You're excused at this time. Have a pleasant evening, and we'll see you tomorrow morning at 9:30.

APPENDIX F

United States District Court
Central District of California

United States of America, Plaintiff, *vs.* **Gary Halbert,** Defendant.	NO. CR-78-485-MML **Notice of Defense of Diminished Capacity** Trial Date: 8/11/81

TO: SUSANNE B. CONLON, United States Attorney, 1300 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012:

PLEASE TAKE NOTICE that the Defendant, GARY HALBERT, intends to rely upon the defense of diminished capacity, mental disease or defect inconsistent with the mental element required for the mail fraud offense charge (as provided in Rule 12.2 of the Federal Rules of Criminal Procedure) at the time of the commission of the alleged crime and will offer proof of such defense at trial of this action.

DATED: August 3, 1981

APPENDIX G

United States District Court
Central District of California

United States of America,	
Plaintiff,	NO. CR-78-485-MML
vs.	**Affidavit in Support of**
Gary Halbert,	**Motion For New Trial**
Defendant.	

COUNTY OF UTAH
STATE OF UTAH } ss.

I, Charles Abbott, being first duly sworn, depose and say:

1) That I am the attorney for the defendant in this matter, Gary Halbert.

2) On August 20, 1981, directly following the verdict of the jury in this case, at or about 5:00 P.M., I approached four of the jurors. I informed them that it was proper for me to discuss the case with them now that the verdict had been given, and told them that information they could give me as to the basis for their decision might be of help to me in future cases. I then asked what was the most important reason why we lost.

3) One of the jurors immediately blurted out the following: "Well, for one thing, that big house on the beach didn't help him any!" He then went on to explain: "My wife and I were living in a house that we rented for only $500 or $600 per month right at about the same time this all happened, and I felt he could have done the same." He further said that if the defendant had really been trying to save the business "he would not have continued to live in such a lavish home."

I replied that I had hoped that the jury would not hold it against the defendant that he lived in a large home, because three families were sharing it to save money, and it was furnished poorly.

Near the conclusion of our conversation another juror opened her purse and said, "Did you see this in the newspaper this morning?" She extracted from her purse the newspaper article a copy of which is attached to the motion as Exhibit A.

I replied that I had not seen it, and she thereupon handed it to me, saying, "That's the defendant's house!" I quickly scanned it; and then as I handed it back to her she said, "I'm keeping this as a little souvenir of the trial."

I declare under penalty of perjury that the foregoing is true and accurate.

Dated: August 29, 1981

_____
Charles F. Abbott

STATE OF UTAH |
ss.
COUNTY OF UTAH |

On this 29th day of August, 1981, personally appeared before me Charles F. Abbott, and being first duly sworn, duly executed the above affidavit.

_____
notary public

My commission expires _____

Office-Supreme Court, U.S.
FILED
DEC 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-658

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY HALBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in allowing the government to rebut expert testimony on the issue of petitioner's mental state at the time of the offense.

2. Whether the district court erred in admitting evidence of petitioner's activities during the period he claimed to be incompetent.

3. Whether there was juror misconduct requiring an evidentiary hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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GARY HALBERT, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 712 F.2d 388.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1983. A petition for rehearing was denied on August 23, 1983. The petition for a writ of certiorari was filed on October 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 16 counts of mail fraud,

in violation of 18 U.S.C. 1341 (Pet. App. A1).[1] Petitioner was sentenced to concurrent 18-month terms of imprisonment on each count (Pet. 4). The court of appeals affirmed (Pet. App. A1-A5).

1. The evidence at trial showed that petitioner, with the assistance of co-defendants Lawrence Bucklan and George Culbertson,[2] initiated three mail order promotions in 1976 to profit from the Nation's bicentennial anniversary (2 Tr. 220-226; 3 Tr. 347-350, 373-374). Solicitations for the sale of high quality commemorative books and a collector's plate were mailed to thousands of people across the country (2 Tr. 223-225; 3 Tr. 351, 374). Petitioner and his co-defendants used false and fictitious names to deceive the public into believing that the bicentennial books and plate were offered for sale by bona fide historical societies and a collector's guild (3 Tr. 360, 373). In reality, the scheme was operated out of a single "boiler room" (3 Tr. 373-374).

The elaborately described commemorative items solicited in the mailings did not in fact exist (2 Tr. 239; 3 Tr. 363, 374). Petitioner and his cohorts obtained approximately $200,000 from people who responded to their mail solicitations (2 Tr. 237; 3 Tr. 363, 374). This money was used by petitioner and his co-defendants for other mailings and personal expenses (2 Tr. 239; 3 Tr. 365-366).

When non-delivery complaints were received, lulling letters containing various false statements were sent at petitioner's direction and approval to explain the

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[1] Petitioner was indicted on 21 counts, but 5 counts were dismissed at the close of his first trial (Pet. 4).

[2] Co-defendants Bucklan and Culbertson pleaded guilty prior to petitioner's trial (2 Tr. 249; 3 Tr. 387).

reasons for the "delay in shipment" (2 Tr. 242-243; 3 Tr. 367). Petitioner instructed Bucklan and Culbertson to conceal his role in the ventures if interviewed by postal authorities (2 Tr. 245; 3 Tr. 383, 386). When first interviewed by postal inspectors, petitioner himself denied that he had any connection with the bicentennial promotions (3 Tr. 409).

2. Prior to trial, petitioner gave notice of his intention to rely on a defense of diminished capacity. The evening before trial, petitioner was examined by forensic psychiatrist Dr. David M. Trockman (4 Tr. 625; 5 Tr. 738). At trial, Trockman testified that petitioner was so mentally deranged during the period covered by the mail fraud charges that he lacked the specific intent to defraud (4 Tr. 609). In Trockman's opinion, petitioner had been brainwashed by a therapy group he had joined and that even if petitioner had intended to defraud others, it really would not have been he doing it (4 Tr. 613, 644). In forming that opinion, Dr. Trockman relied extensively on statements petitioner made during his examination (4 Tr. 611, 623-624, 628). Dr. Trockman then proceeded to relate some of petitioner's statements (4 Tr. 618-639).

Petitioner thereafter testified on his own behalf, saying that the failure of the bicentennial promotions was due to his co-defendants' ineptitude and his own bad decisions (5 Tr. 711-719). Petitioner admitted on cross-examination that, during the period of his therapy, he had written stamp collecting and silver commodities books (5 Tr. 747-752). He claimed, however, that during this same period of time his mail order stamp promotion (G.C.H. and Co.) was successfully managed by George and Charlotte Jenney, who did the banking, filled the orders, and made any

refunds (5 Tr. 709-711). Petitioner denied any knowledge that G.C.H. and Co. had also failed to make promised refunds (5 Tr. 752).

In rebuttal, the government presented Dr. Saul Faerstein, a forensic psychiatrist, who had examined petitioner a week before trial (5 Tr. 822). Dr. Faerstein testified that, in his opinion, petitioner had the capacity during the period covered by the indictment to defraud the persons named as victims in that document (5 Tr. 823). He found no evidence that petitioner was "brainwashed" during the relevant period (5 Tr. 825), and he declined to express an opinion whether or not petitioner actually exercised an intent to defraud because that issue was "clearly in the domain of the jury" (5 Tr. 829).

The government also presented the testimony of Kay Petitte, who was petitioner's secretary during the time he claimed to be incompetent, to rebut petitioner's assertion that he was not actively in charge of the successful stamp book promotion (5 Tr. 812). Petitte testified that she regularly received orders from petitioner and that it was petitioner who had directed her not to fulfill refund obligations (5 Tr. 812-815).

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the district court erred in allowing into evidence the testimony of the government's psychiatrist concerning statements made by petitioner during a court-ordered psychiatric examination. Specifically, petitioner argues that such testimony violated Fed. R. Crim. P. 12.2(c), his Fifth Amendment right against self-incrimination, this Court's holding in *Estelle* v. *Smith*, 451 U.S. 454 (1981), and the holdings of other lower federal courts. Petitioner's arguments are meritless.

Rule 12.2(b) requires a defendant to give notice prior to trial of his intention to rely on a defense of mental disease or defect inconsistent with an essential element required for the offense charged. Rule 12.2(c) gives the trial court authority, upon motion of the government, to order the defendant to submit to an examination by a psychiatrist designated by the court. At the time of petitioner's trial, Rule 12.2(c) also provided that "[n]o statement made by the accused in the course of any examination provided for by this rule, * * * shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." [3]

Petitioner filed notice prior to trial of his intention to rely on the defense of diminished capacity (Pet. 6) and submitted to a court-ordered examination (Pet. 7). The psychiatrist testified at trial without objection. The testimony contested by petitioner, therefore, constitutes grounds for reversal only if its admission into evidence was plain error. Fed. R. Crim. P. 52(b).[4]

Petitioner does not dispute the fact that, had he chosen to rely on the defense of insanity, his statements to the psychiatrist would have been admissible

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[3] Rule 12.2(c) has since been amended to remove any possible doubt that petitioner's statements to the government psychiatrist were properly admitted into evidence. The new rule deletes the problem phrase "on the issue of guilt" and specifically provides that evidence developed during a court-ordered examination may be used "on an issue respecting mental condition on which the defendant has introduced testimony." House Comm. on the Judiciary, 98th Cong., 1st Sess., *Rules of Criminal Procedure for the United States District Courts* 15 (Comm. Print 1983).

[4] See *United States* v. *Dysart*, 705 F.2d 1247, 1253-1254 (10th Cir. 1983); *United States* v. *Bondurant*, 689 F.2d 1246, 1249 (5th Cir. 1982).

(Pet. App. A3).[5] Petitioner argues, however, that because he chose to rely on the defense that he suffered from a mental condition vitiating the mental element of the crime charged (under Rule 12.2(b)) instead of a defense of insanity (under Rule 12.2 (a)), his statements to the psychiatrist bear directly on the issue of guilt and are thus inadmissible under Rule 12.2(c).

As the court of appeals found (Pet. App. A3), however, petitioner's argument elevates form over substance. "[T]here is no indication that the language in Rule 12.2[(c)] regarding statements 'on the issue of guilt' was designed to cover statements relating to defendant's mental capacity. Issues relating to defendant's mental capacity necessarily overlap with 'the issue of guilt.' Because Congress intended to permit the admission of statements related to insanity, there is little doubt that it also intended to admit statements related to mental capacity in general" (Pet. App. A3).[6]

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[5] See H.R. Conf. Rep. 94-414, 94th Cong., 1st Sess. 10 (1975):

> [Rule 12.2] does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissible on that issue.

[6] The correctness of the court's reasoning is borne out by the recent amendments to Rule 12.2(c). The amendment to the rule specifically provides that statements made by a defendant in a court-ordered examination shall be admitted into evidence on the issue of his mental condition once he has introduced evidence on the subject. The Advisory Committee's Note makes clear that the change in wording did not change the law under Rule 12.2(c). H.R. Doc. 98-55, 98th Cong., 1st Sess. 55 (1983). Rather, the changes were made to reflect more accurately the Fifth Amendment considerations at play

The sole purpose of an examination under Rule 12.2(c) is to provide the government with evidence regarding a defendant's mental capacity. *United States* v. *Madrid*, 673 F.2d 1114, 1120-1121 (10th Cir. 1982), cert. denied, No. 81-6726 (Oct. 4, 1982); *United States* v. *Leonard*, 609 F.2d 1163, 1165-1166 (5th Cir. 1980); *United States* v. *Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), aff'd on other grounds, 672 F.2d 115 (1982). Therefore, when a defendant raises an issue regarding his mental capacity, and especially when he relies on his own psychiatrist witness, he should not be allowed to muzzle the government's psychiatrist at his option (Pet. App. A3). *United States* v. *Julian*, 469 F.2d 371, 376 (10th Cir. 1972). This logic applies equally when the issue raised by the defendant is "diminished capacity" rather than "insanity" (see Pet. App. A3).[7]

Petitioner argues that this Court's ruling in *Estelle* v. *Smith*, *supra*, precludes the use of his statements to the government's psychiatrist. In *Estelle*, this Court held that a "criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not be compelled to respond to a psychiatrist if his statements can be used against

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in this context as well as this Court's recent decision in *Estelle* v. *Smith*, *supra*. The Committee Note specifically points out that a court-ordered sanity or other mental examination may be the only means available to the state to controvert proof on an issue the defendant has interjected into the case. H.R. Doc. 98-55, *supra*, at 55. See *Estelle*, 451 U.S. at 465.

[7] Cf. *United States* v. *Cohen*, 530 F.2d 43, 48 (5th Cir. 1976) ("[t]o hold that compelled psychiatric examinations are forbidden because sanity is an element of the offense and that the privilege against self-incrimination prohibits compulsory elicitation of statements going to an element of the offense would be confining ourselves within an analytical prison").

him at a capital sentencing proceeding." 451 U.S. at 468 (emphasis added). The Court therefore foreclosed the use of information learned during a competency examination—an examination neither sought by nor even known to defense counsel—at the penalty phase of a bifurcated proceeding. At the same time, however, the Court was careful to emphasize that "a different situation arises where a defendant intends to introduce psychiatric evidence." 451 U.S. at 472.

Since petitioner put his mental competency at issue when he raised the diminished capacity defense and introduced psychiatric testimony on that defense, the situation here is one of the "different situations" contemplated by this Court in *Estelle*. "In such circumstances examination by a psychiatrist may be ordered and he may testify against the defendant concerning the competency issue without violation of the Fifth Amendment privilege." *United States* v. *Madrid*, 673 F.2d at 1121; accord, *Vardas* v. *Estelle*, 715 F.2d 206, 209 (5th Cir. 1983); *United States* v. *Reifsteck*, 535 F.2d 1030, 1033-1034 (8th Cir. 1976); *Karstetter* v. *Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975); *United States* v. *Greene*, 497 F.2d 1068, 1081 (7th Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States* v. *Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States* v. *Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); *United States* v. *Albright*, 388 F.2d 719, 724-725 (4th Cir. 1968).

Here, no statement concerning the offense itself was offered into evidence by the government through the psychiatrist. Nor did the psychiatrist testify that petitioner actually had an intent to defraud at the time of the offense. That question was left for the jury's determination. Moreover, it was entirely proper

for the psychiatrist to state the basis upon which he had formed his opinion, even if that basis included statements made by petitioner. See *Hollis* v. *Smith*, 571 F.2d 685, 690 (2d Cir. 1978) (the self-incrimination privilege protects only against the compulsion of incriminating testimonial declarations; responses to a psychiatrist, presenting no threat of disclosure of prosecutable crimes, do not rise to the level of "compelled testimonial self-incrimination"). See also *Ronson* v. *Commissioner of Correction*, 551 F. Supp. 450, 457 (S.D.N.Y. 1982).

Contrary to petitioner's contention (Pet. 11-12), the ruling of the court below is not in conflict with its own decisions or those of other federal courts. The cases relied on by petitioner have either been mischaracterized by him [8] or deal with 18 U.S.C. 4244, not Rule 12.2.[9] Unlike an examination under

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[8] Petitioner cites *United States* v. *Leonard*, 609 F.2d 1163 (5th Cir. 1980), as a case at odds with the decision below. Petitioner fails to point out that the defendant in *Leonard*, subsequent to the psychiatrist's examination but before trial, stipulated to his mental competency at the time of the alleged offenses and waived the issue. At trial, the government cross-examined Leonard as to the statements made by him to the psychiatrist. The court found that the use of such statements on issues other than sanity was impermissible under Rule 12.2(c). The court did not rule, however, that such statements would not have been admissible on the issue of sanity.

[9] There is some confusion as to whether a psychiatrist who has conducted a court-ordered examination pursuant to 18 U.S.C. 4244 on a defendant's competency to stand trial may also testify at trial regarding the defendant's mental state at the time of the charged offense. Cases allowing such dual purpose examinations include *United States* v. *Whitlock*, 663 F.2d 1094, 1107 (D.C. Cir. 1980); *United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *United States* v. *Albright*, 388 F.2d 719, 724-725 (4th Cir. 1968). But see *United States*

Section 4244, which is designed to determine competency at the time of trial, the very purpose of a court-ordered examination under Rule 12.2(c) is to secure testimony on the issue of mental condition at the time of the alleged offense. *United States* v. *Leonard*, 609 F.2d at 1166.

2. Petitioner's next contention (Pet. 18-20) is that the district court erred in allowing into evidence testimony concerning business promotions managed by petitioner during the time he was allegedly incompetent. Specifically, petitioner complains that the rebuttal testimony of his former secretary, Kay Petitte, was offered to impeach his credibility on an extrinsic matter and thereby violated Fed. R. Evid. 608(b). However, as the court of appeals found (Pet. App. A5), Petitte's testimony was not offered solely to impeach petitioner's credibility but also was highly relevant concerning petitioner's defense of diminished capacity. Further review of this essentially fact-bound claim is unwarranted.

On direct examination, petitioner testified about his "other" promotions.[10] He had stated that G.C.H. and Co. was run by George and Charlotte Jenney and that they had been in charge of banking, filling or-

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v. *Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975); *United States* v. *Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973). We note that the *Malcolm* court seemed to base its decision on the fact that defendant had not placed his sanity in issue at the time of the examination. 475 F.2d at 425.

[10] Having opened up the subject of his involvement in the G.C.H. promotion during his own direct examination and having denied knowledge of refund problems on cross-examination, petitioner cannot now complain that testimony reflecting upon his truthfulness was admitted. See *United States* v. *Wright*, 542 F.2d 975, 980 (7th Cir. 1976).

ders, and making refunds. In rebuttal, Petitte testified that petitioner had given her directions in regard to the operations of G.C.H. and Co. and that he had specifically told her he was low on funds and could not authorize further refunds. This testimony was relevant and necessary to rebut petitioner's claim that he was not capable of making business decisions at the time of the charged offenses. As the district court noted before Petitte testified (5 Tr. 810-811), "almost anything she says in regard to his position of not giving refunds would be relevant as to the intent and state of mind he was acting with during concurrent promotions." That ruling certainly was correct.[11]

3. Petitioner finally contends (Pet. 13-18) that he was denied a fair trial because the jury had access to a newspaper article about the auction of a Santa Monica beach house he had rented four years earlier. The court of appeals, after an independent review of the alleged juror misconduct, agreed with the district court that there was no possibility that the extrinsic material could have affected the verdict (Pet. App. A1-A2). There is no reason to review further this fact-based decision by both courts below.

Immediately following trial, petitioner's counsel confronted several jurors and asked why petitioner had been convicted (7 Tr. 982). One juror purportedly responded that petitioner's beach house "didn't

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[11] See Fed. R. of Evid. 404(b). See also *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967) (listing proof of intent as one permissible use of prior crimes evidence); *United States* v. *Weidman*, 572 F.2d 1199, 1202 (7th Cir. 1978) (mail fraud requires proof of intent and similar uncharged acts are admissible when accused has denied having the intent to commit the acts charged).

help him any" (Pet. App. G1). Another juror removed from her purse a newspaper article containing a photograph of petitioner's former house with a description of its history. The article did not refer to petitioner in any manner.

During trial, co-defendants Bucklan and Culbertson had testified that the $1,800 monthly rent on the house had been paid from proceeds of the bicentennial promotions (2 Tr. 240; 3 Tr. 366). There was no objection to the receipt into evidence of an enlarged photograph of the beach house or the $1,800 rent checks (2 Tr. 240; 3 Tr. 309-312, 377).

The court of appeals found that the juror misconduct allegations did not require reversal because at the trial "the jurors heard considerable evidence about the beach house and [petitioner's] life style" (Pet. App. A2). The newspaper articles did not include evidence that was inadmissible or that was not already properly available to the jury. See *United States* v. *Jones*, 542 F.2d 186, 196 (4th Cir.), cert. denied, 426 U.S. 922 (1976). Nor did the district court abuse its discretion in not holding an evidentiary hearing. See *United States* v. *Hendrix*, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818 (1977) (trial court had discretion to determine whether to hold evidentiary hearing). A hearing was not necessary in this situation, where the full nature of the extraneous material was known and its lack of prejudicial effect was clear. *United States* v. *Hood*, 593 F.2d 293 (8th Cir. 1979); *United States* v. *Hendrix*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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